Mary E. McAlister SBN 148570
Liberty Counsel
P.O. Box 11108
Lynchburg, VA 24506
Telephone (434) 592-7000
Email court @lc.org

Mathew D. Staver *
Horatio G. Mihet*
Liberty Counsel
P.O. Box 540774
Orlando, FL 32854
Telephone (407) 875-1776
Email court@lc.org
*Admitted pro hac vice

Attorneys for Real Parties in Interest,
Dan H. Wilks and Staci Wilks, Trustees
of the Heavenly Father's Foundation Trust

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF VENTURA

DOS VIENTOS COMMUNITY PRESERVATION ASSOCIATION, A California unincorporated association, and DONALD ARMSTRONG,

Petitioners,

vs.

CITY OF THOUSAND OAKS, a municipal corporation and DOES 1-25, inclusive,

Respondents

DAN H. WILKS AND STACI WILKS, TRUSTEES OF THE HEAVENLY FATHER'S FOUNDATION TRUST, dated December 27, 2010, a 501(c)3 Charitable Organization, CALVARY CHAPEL OF THOUSAND OAKS, a California nonprofit religious corporation and DOES 26-50, inclusive,

Real Parties in Interest

Case No. 56-2018-00510555-CU-MC-VTA

REAL PARTIES IN INTEREST'S/DEFENDANTS' DAN H. WILKS and STACI WILKS, TRUSTEES OF THE HEAVENLY FATHER'S FOUNDATION TRUST'S NOTICE OF MOTION AND MOTION FOR DEMURRER TO THE SECOND AMENDED PETITION AND COMPLAINT; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT

Judge Kent Kellegrew
Date Action Filed: April 18, 2018
Writ Hearing Date: Not Set
Demurrer Hearing Reservation Number 2373179
Date: December 10, 2018
Time: 8:30 a.m.
Dept.: 21

NOTICE

TO PETITIONERS DOS VIENTOS COMMUNITY PRESERVATION ASSOCIATION, a California unincorporated association, and DONALD ARMSTRONG, (collectively, "Petitioners"), AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 10, 2018, at 8:30 a.m. or as soon thereafter as the matter may be heard, in Department 21 of the above-captioned Court, located at 800 South Victoria Avenue, Ventura, California, Real Parties in Interest, DAN H. WILKS AND STACI WILKS, TRUSTEES OF THE HEAVENLY FATHER'S FOUNDATION TRUST, dated December 27, 2010, a 501(c)3 Charitable Organization, will and hereby do demur to the Petitioners' Second Amended Petition and Complaint on the ground that the Petition, and each cause of action therein asserted fails to state a cause of action pursuant to Code of Civil Procedure section 430.10(e).

The demurrer is based on this Notice of Demurrer and Demurrer, the Memorandum of Points and Authorities attached hereto, the pleadings, papers, and records herein, the matters of which the Court may take judicial notice, and on such other evidence and argument as may be presented at or prior to the hearing on the demurrer.

Dated: November 5, 2018

/s/ Horatio G. Mihet
Mary E. McAlister SBN 148570
Mathew D. Staver*
Horatio G. Mihet*
Liberty Counsel
Attorneys for Real Parties in Interest Dan H. Wilks And Staci Wilks, Trustees Of The Heavenly Father's Foundation Trust
*Admitted pro hac vice

DEMURRER

Real Parties in Interest, Dan H. Wilks And Staci Wilks, Trustees Of The Heavenly Father's Foundation Trust, dated December 27, 2010, a 501(c)3 Charitable Organization (the "Foundation") hereby demur to the First Amended Petition of Petitioners Dos Vientos Community Preservation Association, a California unincorporated association, and Donald Armstrong (collectively "Petitioners") on each of the following grounds:

Demurrer to First Cause of Action

The First Cause of Action fails to state facts sufficient to constitute a cause of action as against the Foundation.

Demurrer to Second Cause of Action

The Second Cause of Action fails to state facts sufficient to constitute a cause of action as against the Foundation.

Demurrer to Third Cause of Action

The Third Cause of Action fails to state facts sufficient to constitute a cause of action as against the Foundation.

WHEREFORE, the Foundation respectfully requests that the Court sustain a general demurrer without leave to amend in favor of the Foundation as to Petitioners' Second Amended Petition.

Dated: November 5, 2018

/s/ Horatio G. Mihet
Mathew D. Staver*
Horatio G. Mihet*
Mary E. McAlister SBN 148570
Liberty Counsel
Attorneys for Real Parties in Interest Dan H. Wilks And Staci Wilks, Trustees Of The Heavenly Father's Foundation Trust
*Admitted pro hac vice

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEMURRER BY THE FOUNDATION

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REGULATIONS

INTRODUCTION

Petitioners added two paragraphs to their First Amended Petition to address this Court's concern about exhaustion of administrative remedies but did nothing to address the significant underlying defects addressed in Real Parties in Interest Dan H. Wilks And Staci Wilks, Trustees of The Heavenly Father's Foundation Trust's (the "Foundation") demurrer to the First Amended Petition. Therefore, as was true of the First Amended Petition and Complaint, Petitioners' Second Amended Petition and Complaint (SAP) fails to allege material facts necessary to seek mandamus or declaratory relief for either violation of the Municipal Code or Violation of the California Environmental Quality Act ("CEQA").

Petitioners are asking this Court to compel the City of Thousand Oaks (the "City") to undertake a full development plan process and environmental review for the Foundation's purchase of a vacant building, once housing a YMCA, and proposal to lease the building to Real Party in Interest Calvary Chapel for a "church use." Despite three attempts, Petitioners have not alleged material **facts** showing that the Foundation's actions will have any, let alone, significant, effects on the environment sufficient to trigger a new development plan or CEQA review. Instead, Petitioners offer legal conclusions and recite boilerplate allegations about increases in "groundborne vibrations," "noise" and traffic with no facts demonstrating that such effects actually apply to the subject property. Furthermore, the City has already concluded and stated that there are no such effects, and that no CEQA review can be required for this change in occupancy without running afoul of state and federal prohibitions against differential treatment of churches. (City's Answer to original Petition, ¶¶43-50). In addition, as described in Defendant Calvary Chapel's Demurrer, Petitioners have not even alleged sufficient facts to show that they have standing to bring these claims, nor that their claims are ripe for review. The Foundation adopts and joins in the demurrer grounds raised by Calvary Chapel.

Nevertheless, Petitioners maintain that there will be unidentified environmental effects from using the existing building as a church instead of a private, members-only recreational facility so that a full environmental analysis must occur. Petitioners attempt to bolster their allegations with manufactured terms such as a "public benefit" use and "private secular church use," which are not

present in any of the development approvals for the underlying subdivision, and, in the case of "private secular church use," is nonsensical and oxymoronic. Petitioners refer to but fail to provide the approved development plan for the property, which permits them to create terms that in fact are not part of the City's approvals. The actual City documents, which the Foundation has provided in its Request for Judicial Notice,[1] show that the Subject Property was deeded to the YMCA for a community service facility, not for a "public benefit" use, whatever that is. Since the property was and has remained in private ownership, not dedicated to the public, there are no facts to support the claim of "public benefit." Therefore, there are no material facts to show that change in occupancy from the YMCA to Calvary Chapel represents a change in use triggering environmental review. Instead, Petitioners' efforts to manufacture terms to describe the YMCA and Calvary Chapel uses implies an intent that the Court compel the City to accord differential treatment of the Foundation's proposal because it is a "church use." Such differential treatment would violate, *inter alia,* the federal Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc. Compelling an illegal act is not a proper basis for mandamus or declaratory relief. Consequently, this Court should grant the Foundation's request for a Demurrer without leave to amend.

FACTUAL ALLEGATIONS

In 2002, the City Council adopted Resolution No. 2002-040 that approved numerous development projects in what is known as the Western Plateau region of the City including the community known as Dos Vientos. (Exhibit A to the Request for Judicial Notice, the "Resolution"). As part of that approval, the City undertook environmental review as required under CEQA and

---

[1] The California Supreme Court has held that judicial notice is not limited to documents brought to the Court's attention by the parties, but can be taken *sua sponte* of documents issued by governmental officers or agencies, in this case, the City. Indeed, California courts properly take judicial notice of official acts and public records, such as the Resolution at issue here. *See People v. Castillo*, 49 Cal. 4th 145, 158 (Cal. 2010). And California courts routinely grant demurrers by reference to city ordinances and other public documents, even when they are not attached to the complaint. *See e.g., Igna v. City of Baldwin Park*, 9 Cal. App. 3d 909, 911–12 (1970) (court appropriately took judicial notice of a city ordinance attached to demurrer). Particularly, when as is true in this case, Petitioners refer to but do not include a government enactment, courts permit judicial notice of the documents in considering a demurrer. *Ingram v. Flippo*, 74 Cal.App.4th 1280, 1285 n.3 (1999).

reviewed and approved Environmental Impact Reports covering various aspects of the projects. (Resolution, p. 8). The City determined that, while certain conditions of approval would offer "substantial mitigation of the impacts related to grading, certain effects cannot be feasibly or effectively mitigated to a level of insignificance by any redesign of the Project, and the City Council hereby finds that economic, social or other public considerations make infeasible any additional mitigation measures or project alternatives." (*Id.*). Therefore, in accordance with Public Resources Code §1081 and 14 California Code of Regulations §15093, the City prepared a Statement of Overriding Considerations to "substantiate the City Council's decision to approve of these unavoidable adverse environmental effects because of the benefits afforded by the proposed project." (*Id.)*.

Among the benefits listed in the Statement was "The Project will require Miller Brothers to provide free land for the local YMCA to build a new facility in Dos Vientos area." (*Id.* at 9). That requirement was included as a condition of approval:

> No final subdivision map for Tract 5330, Tract 5342, Tract 5096, or Tract 5200 shall be recorded until and unless Miller Brothers has deposited into escrow a deed, in form satisfactory to the City Attorney, conveying to the Conejo Valley YMCA lot 1 of Tentative Tract 5096 (the YMCA site).

(*Id.* at 15). The property known as the YMCA site ("Subject Property") was part of Development Permit 2001-775 approved as part of the Resolution. (*Id.* at 181, Exhibit L p. 1). The City Council made the following findings regarding approval of that permit:

> With the conditions imposed by the City Council, the granting of this permit:
> a. Will maintain the degree of compatibility of property uses that the Zoning Ordinance is intended to promote and preserve, considering the particular use on the particular site and existing or proposed uses on parcels within the zone in which the use is proposed to be located; and
> b. Will not result in a use which may reasonably be expected to become obnoxious, dangerous, offensive or injurious to the public health, safety or welfare, by reason of the emission of noise, smoke, dust, fumes, vibrations, odor or other harmful or annoying substances; and
> c. Will preserve the integrity and character of the zone in which the use will be located and the utility and value of property in the zone and in adjacent zones; and
> d. Will not be or become detrimental to the public interest, health, safety, convenience or general welfare.

(*Id*.). The City further described the nature of that Development Permit: "The Development Permit

is granted to allow the construction of a commercial retail center and **community service (YMCA) facility**." (*Id.* at 182, Exhibit L, p. 2) (emphasis added).

Petitioners allege that the developer conveyed the Subject Property to the YMCA as described in the Resolution, and that a YMCA facility was operated on the Subject Property from 2007 to December 2017. (SAP ¶¶22-23). Petitioners allege that the Subject Property was sold to the Foundation on January 16, 2018. (SAP ¶24). Petitioners allege that they believe that the Foundation has commenced action to establish what Petitioners refer to as a "church use" to be conducted by Calvary Chapel. (SAP ¶¶25-26). Petitioners do not define "church use," but claim that it is not allowed under the City's zoning code without a Development Permit and full environmental review under CEQA. (SAP ¶32). Petitioners do not identify the portion of the City Zoning Code under which they claim the "church use" is not allowed. (*Id.*). The City identifies the relevant zoning designation as C-1 (Neighborhood Shopping Center), which allows "places of worship (religious facilities)" on land with an underlying Development Permit, in this case Development Permit 2001-775 for the entire shopping center. (City Answer ¶45). In addition, City Code ¶9-4.2105 provides that "civic and institutional" uses, which include private clubs (YMCA) **and places of worship** (Calvary Chapel) are permitted uses.

Petitioners repeatedly allege that the 2002 Development Plan provides for what they term but do not define as a "public benefit" use, apparently implying that the property was going to be owned by and open to the general public. (SAP ¶¶1, 2, 13, 20, 23, 33, 34, 36, 38, 39, 44, 46, 50, 53-56, 62). Petitioners allege that the term "public benefit" is used by the City to describe the YMCA. (*Id.*). However, the Resolution does not contain the term "public benefit," but refers to a "community service (YMCA)" facility. (Resolution, p. 182, Exhibit L, p. 2). Also, the Resolution did not provide for public ownership of the facility, but required that the Subject Property be transferred from the developer, a private party, to the YMCA, a private organization. (*Id.* at 9). Furthermore, the Resolution provided for a transfer of land for the YMCA to use to build "a facility" but did not specify how the facility would be used except for "community service." (*Id.*).

Petitioners also do not define their term "private secular church use," which is oxymoronic since "secular" means "of or relating to the worldly or temporal secular concerns; not overtly or

specifically religious; not ecclesiastical or clerical."[2] Therefore, Petitioners are saying that the Foundation is proposing a private "non-church church" use. That undefined, nonsensical term is repeated throughout the Second Amended Petition, as it was in the original Petition and First Amended Petition.[3] (SAP ¶¶ 33, 34, 36, 41, 44, 46, 50, 62, 63). As is true with "public benefit" the term "private secular church use" is undefined and is not utilized in the City Code or documents associated with the subject property, and therefore is not a material fact upon which claims for mandamus or declaratory relief can be based.

Petitioners' only allegations about purported environmental effects of the Foundation's proposal–necessary prerequisites for environmental review–come in the form of boilerplate language:

> [A]n activity which will cause either a direct physical change(s) in the environment, or a reasonably foreseeable indirect physical change(s) in the environment, including but not limited to (i) an adverse impact on land use and planning because it will conflict with the applicable land use plans described hereinabove and the Statement of Overriding Considerations which were adopted specifically for the purpose of avoiding the environmental effects of the Western Plateau Preservation Plan; (ii) exposing persons to a generation of excessive groundborne vibration or groundborne noise levels; a substantial permanent increase in ambient noise levels in the vicinity of the Subject Property; and a substantial temporary or periodic increase in ambient noise levels in the vicinity of the Subject Property; and (iii) causing an increase in traffic which is substantial in relation to the existing traffic load and capacity of the street system; exceeding a level of service standard established by the county congestion management agency for designated roads or highways; substantially increasing transportation/traffic hazards due to a design feature or incompatible uses; and resulting in an inadequate parking capacity.

(SAP ¶51). That laundry list of definitions of environmental impacts that trigger CEQA **contains no material facts identifying the actual existence of such impacts vis-à-vis the Foundation's activities on the subject property**. There are no material facts alleging that the Foundation's use of

---

[2] Merriam Webster online dictionary https://www.merriam-webster.com/dictionarysecular?utm_campaign=sd&utm_medium =serp&utm_source=jsonld (last visited July 30, 2018).

[3] Notably, Petitioners have not abandoned the term, tried to explain it or point to where it appears in any document associated with the property. Instead, in their opposition to the Foundation's Demurrer to the Frist Amended Petition, Petitioners berated the Foundation for using "oxymoronic," without providing evidence to disprove the label or define their created term.

this property **actually will** involve a change in the building footprint, significant changes to the exterior of the existing building, groundborne vibrations, changes to the existing parking lot layout or increases in traffic. Without such allegations, Petitioners cannot allege that the City failed to comply with the City Code or CEQA with regard to the Subject Property. Consequently, there are insufficient facts to state claims for mandamus or declaratory relief.

LEGAL ARGUMENT

In determining whether the Petition alleges sufficient facts to state a cause of action, the Court treats the demurrer as admitting all material facts properly pleaded, but not contentions, deductions or conclusions of fact or law. *Serrano v. Priest,* 5 Cal. 3d 584, 591 (1971) (en banc), *see also, Cedar Fair, L.P. v. City of Santa Clara,* 194 Cal. App. 4th 1150, 1159-60 (2011) (citing *Serrano* for the "long-settled" rules for reviewing the sufficiency of a complaint). When, as here, Petitioners are seeking a writ of mandate under Code Civ. Proc., §1085(a), the party seeking writ relief must establish "(1) A clear, present and usually ministerial duty on the part of the respondent ...; and (2) a clear, present and beneficial right in the petitioner to the performance of that duty...." *Cedar Fair*, 194 Cal. App. 4th at 1160 (citing *Santa Clara County Counsel Attys. Assn. v. Woodside*, 7 Cal. 4th 525, 539–40 (1994)).

Furthermore, where, as here, Petitioners are attempting to use Code Civ. Proc. §1085 to compel a public agency to set aside a decision for failure to comply with CEQA, "[i]t is incumbent upon the petitioner ... to first state a prima facie case entitling the petitioner to relief. To state a cause of action warranting judicial interference with the official acts of defendants, [the plaintiffs] **must allege much more than mere conclusions of law**; they must aver the **specific facts** from which the conclusions entitling them to relief would follow." *Id.* (emphasis added) (citing *Sipper v. Urban*, 22 Cal.2d 138 (1943); *California Correctional Peace Officers Assn. v. State Personnel Bd.*, 10 Cal.4th 1133, 1155 (1995)).

Petitioners have failed to do so. Instead of alleging specific facts regarding the actual and anticipated uses of the Subject Property, they offer deductions based on manufactured terms, boilerplate legal conclusions and contentions. Instead of attaching the actual operative development permit and environmental review for the underlying development, Petitioners inaccurately

paraphrase the plan as providing for a "public benefit" YMCA use. In fact, the actual wording of the City approval does not contain that phrase, but describes a transfer of land to a private organization for use as a community service facility, in contrast to the commercial and residential uses in the remainder of the development. (Resolution, p. 182, Exhibit L, p. 2). The Resolution does not contain any evidence of public ownership or use of the subject property, but states that the property would be transferred from one private party (the developer) to another (YMCA) (Resolution, p. 182, Exhibit L, p. 2). In other words, the actual facts show ownership of a building by a private organization for operation of a membership-based community facility, not an undefined "public benefit" use. (*Id.*). That being the case, Petitioners do not and cannot allege that the ownership of the building by another private organization for operation of a community facility (a church) is an environmentally relevant event triggering CEQA.

Absent material facts showing a substantial change in the use of the building, Petitioners cannot state a claim for mandamus or declaratory relief. Furthermore, absent material facts showing that use of the existing building as a church is materially different from use as a recreation center, Petitioner cannot claim to have a beneficial right to compel the city to undertake CEQA review of a "church use," because such a review would violate the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA") by according less favorable treatment to a religious land use than to a secular land use. Therefore, the court should sustain the demurrer without leave to amend.

I. PETITIONERS HAVE NOT ALLEGED SUFFICIENT MATERIAL FACTS TO STATE A CLAIM FOR MANDAMUS OR DECLARATORY RELIEF FOR FAILURE TO COMPLY WITH CEQA.

CEQA applies to "discretionary projects proposed to be carried out or approved by public agencies...." (Pub. Res. Code §21080 (a)). "'Project' means an activity which may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment, and which is any of the following: (a) An activity directly undertaken by any public agency. (b) An activity undertaken by a person which is supported, in whole or in part, through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies. (c) An activity that involves the issuance to a person of a lease, permit, license, certificate, or other

entitlement for use by one or more public agencies." *Cedar Fair,* 194 Cal. App. 4th at 1160 (citing Pub. Res. Code §21065; 14 Cal. Code Regs. §§15357 [defining "discretionary project"]; 15378 [defining "project"]). Of particular relevance in this case is the fact that the activity must have the "potential for resulting in a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment" in order to be classified as a "project" under CEQA. (14 Cal. Code Regs, §15378(a) (emphasis added). "Environment" means "the physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." *Preserve Poway v. City of Poway,* 245 Cal. App. 4th 560, 574–75 (2016), *reh'g denied* (Apr. 4, 2016), *review denied* (June 22, 2016) (citing Pub. Res. Code §21060.5.). '"Economic and social changes resulting from a project are not treated as significant environmental effects and, thus, need not be mitigated or avoided under CEQA.'" *Id.* (citing *San Franciscans for Reasonable Growth v. City and County of San Francisco,* 209 Cal.App.3d 1502, 1516 (1989)). "The focus of the analysis shall be on the physical changes." *Id.* (citing 14 Cal. Code of Regulations §15131(a)).

In *Poway,* the court rejected a community organization's challenge to the city's determination that the closure of an equestrian boarding and training facility and conversion to residential use would not have a sufficiently significant physical effect on the environment to require a full environmental impact report, as opposed to a mitigated negative declaration. *Id*. at 578. The organization claimed that a full environmental impact report was necessary because closing the facility would adversely affect the character of the community. *Id.* The Court held that "community character" is not defined in CEQA and has been a consideration by courts only when it dealt with aesthetics such as historic character or ocean views. *Id*. at 577.

> The community character issue here is not a matter of what is pleasing to the eye; it is a matter of what is pleasing to the psyche. This includes Poway's residents' sense of well-being, pleasure, contentment, and values that come from living in the "City in the Country." In this case, community character is not merely aesthetics, but also includes psychological and social factors giving residents a sense of place and identity, what makes them feel good and at home in Poway.

Id. That was not an addressable concern under CEQA. *Id.* at 578.

Similarly here, Petitioners do not allege facts showing that the Foundation's purchase and

use of the Subject Property will have any effect, let alone a significant effect, on the physical environment of the community, *i.e.*, land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance. (Pub. Res. Code §21060.5). Petitioners offer the boilerplate definition of such effects, but no **facts** showing that those effects are actually present at the property. (SAP ¶51). Instead, Petitioners allege only that the building will house a church instead of a YMCA. In other words, as was true of the petitioners in *Poway*, Petitioners here allege only that the "character" of the Subject Property will change. As the court said in *Poway*, that is not an addressable claim under CEQA and therefore cannot state a claim for relief.

In *San Franciscans for Reasonable Growth*, 209 Cal.App.3d at 1516, the court concluded that the potential impact of a project on the availability of child care programs was an economic or social, but not an environmental impact requiring CEQA review. This was true despite the petitioners' contentions that reduced availability of child care programs at the subject property would lead to more driving and, therefore, more carbon emissions. *Id.* Here, Petitioners do not allege facts that would even raise a similar attenuated claim of environmental change resulting from the Foundation's actions.

Instead, Petitioners' conclusory allegations resemble the claims raised by residents living near an office building that was to be leased to the probation department. *City of Pasadena v. State of California*, 14 Cal.App.4th 810, 829 (1993), *disapproved on other grounds as stated in Western States Petroleum Assn. v. Superior Court* 9 Cal.4th 559, 570, n2 (1995). The residents alleged that environmental review was necessary because the change in occupants would have psychological impacts on the neighborhood because of the increased presence of parolees. *Id.* Neighbors claimed that the psychological effects were addressable under CEQA because they had a physical component in the form of the potential for increased vandalism as occurred at prior locations leased to the probation department. *Id.* The court rejected the claim.

> While this record may establish a possibility of a social impact from the location of the parole office, it does not establish the requisite physical change. The only record regarding vandalism, which might be considered a physical impact, is the vague hearsay account by the mayor of Monterey Park. This does not constitute substantial evidence under CEQA.

Id. at 830. Here, by contrast, Petitioners do not allege even vague hearsay accounts of anticipated

physical effects of the Foundation's purchase and use of the Subject Property. (SAP ¶¶51-60). Instead, they merely recite a refrain that the property will go from a "public benefit" YMCA (a manufactured term without factual basis) to a private "non-church church" use (another manufactured term without factual basis). (*Id*.). Petitioners are apparently concerned that use of the building for a church will somehow adversely affect the character of the community akin to the presence of parolees in the neighborhood in *City of Pasadena.* Even if there were factual allegations to that effect, they would not constitute a physical change sufficient to trigger environmental review under CEQA. *City of Pasadena,* 14 Cal.App.4th at 830.

Petitioners' failure to allege material facts showing any physical environmental effects from the Foundation's use of the property means Petitioners have not alleged material facts that place the Foundation's activity outside of the CEQA exemption for continued use of existing facilities at the same level of use, *i.e.*, with negligible or no expansion of the use. 14 Cal. Code of Regs. § 15301.

> Class 1 consists of the operation, repair, maintenance, permitting, leasing, licensing, or minor alteration of existing public or private structures, facilities, mechanical equipment, or topographical features, involving negligible or no expansion of use beyond that existing at the time of the lead agency's determination. The types of "existing facilities" itemized below are not intended to be all-inclusive of the types of projects which might fall within Class 1. **The key consideration is whether the project involves negligible or no expansion of an existing use.** *Id*. (emphasis added).

As the court said in *Martin v. City & Cty. of San Francisco,* 135 Cal. App. 4th 392, 403-04 (2005), the exemption provided in 14 Cal. Code of Regs. §15301 is one of those promulgated under Pub. Resources Code §21084(a) which established "classes of projects which have been determined not to have a significant effect on the environment and which shall be exempt" from CEQA.

> An examination of the CEQA definitions quoted above yields a common theme—in general, they deal with tangible physical manifestations that are perceptible by the senses. "Environment" is a very broad concept encompassing both tangible and intangible factors. But the intangible has CEQA consequence only if there is a nexus to a physically perceivable reality. The major statutory emphasis is on matters that can be seen, felt, heard, or smelled, i.e., consequences resulting from physical impacts on the environment.

Id. While CEQA is to be liberally construed it is also to be given a common sense practical construction. *Id.* at 402. '"[C]ommon sense tells us that the majority of private projects for which a government permit or similar entitlement is necessary are minor in scope—e.g., relating only to the

construction, improvement, or operation of an individual dwelling or small business—and hence, in the absence of unusual circumstances, have little or no effect on the public environment. Such projects, accordingly, may be approved exactly as before the enactment of the EQA.'" *Id*. (citing *Friends of Mammoth v. Board of Supervisors*, 8 Cal.3d 247, 272 (1972)). Such was the case with the project in *Martin*, which involved only interior changes to a historic home. *Id* at 405. "Martin's proposed modifications, being to the interior of an existing single-family residence and not perceptible to others, lack the potential for causing a significant effect on the environment and are beyond the reach of CEQA. For all intents and purposes, **what was visible before will be no different than what will be visible if the modifications are completed**." *Id.* (emphasis added).

The same is true here. Petitioners allege no material facts pointing to any potential for effects on the environment. There are no allegations of changes in the building footprint, parking requirements, noise, or other environmentally significant changes. Consequently, as was true of the changes in *Martin*, the Real Parties' use of the Subject Property is a continuation of an existing use that is categorically exempt from CEQA. 14 Cal. Code of Regs. §15301.

In *Respect Life South San Francisco v. City of South San. Francisco*, 15 Cal.App.5th 449, 460 (2017), the court determined that an application for a use permit to house an abortion clinic in an office building was categorically exempt as continuation of an existing use. Evidence that the presence of the clinic would prompt protests that would affect traffic flow did not rise to the level of an unusual circumstance sufficient to remove the exemption. *Id.* at 459-60. Here there are no allegations of events or circumstances that would affect traffic flow, air quality, traffic, noise or any other environmental factor. If the potential of traffic jams due to protests could not remove an abortion clinic from the continuation of an existing use exemption, then the absence of any effects certainly cannot remove Calvary's occupancy of the building from the continuation of an existing use exemption.

Petitioners have not and cannot allege facts to show that the Foundation's purchase and use of the property constitutes a "project" under CEQA or material facts to show that the categorical exemption for continuation of an existing use. That being the case, the Foundation's demurrer for failure to state a cause of action should be sustained without leave to amend.

II. PETITIONERS HAVE NOT ALLEGED SUFFICIENT MATERIAL FACTS TO STATE A CLAIM FOR MANDAMUS OR DECLARATORY RELIEF FOR FAILING TO COMPLY WITH THE MUNICIPAL CODE.

Petitioners' use of paraphrases and created terms instead of material facts contained in the City's legislative enactments, *i.e.,* the Resolution and Zoning code, means that they also cannot state a claim for mandamus of declaratory relief for a purported failure to comply with the City's Municipal Code. Petitioners allege that:

> Pursuant to the City's Zoning Code, a "church" use, as proposed by Real Parties, is not allowed on the Subject Property without a Development Permit, a discretionary land use entitlement which requires public notice; a public hearing; required legal findings; rights of appeal; and environmental review under CEQA, as set forth hereinbelow. (SAP ¶32).

As is true with Petitioners' reference to the development permit, Petitioners do not indicate what zoning classification purportedly prohibits a "church" use without a full developmental review. In fact, as provided by Real Party in Interest Calvary Chapel's Request for Judicial Notice, the Subject Property is located in the C-1 Zone, which permits, *inter alia*, "Institutional and Civic Uses," which include the YMCA as a private club **and churches** (City Code 9-4.2105). Therefore, under the City's Zoning Code, a church is in the same category as the YMCA and the allegation that the Foundation needs to start from scratch with a new Development Permit is incorrect as a matter of fact and law, meaning that Petitioners have not alleged material facts to support a claim that the City has failed to comply with its City Zoning Code.

Similarly, Petitioners' allegation that the City failed to comply with its City code because "[t]he existing YMCA Development Permit for the commercial shopping center provides for a 'public benefit' YMCA use and does not allow for a private, secular 'church' use on the Subject Property" (SAP ¶33) is not supported by the material facts in the development permit actually approved by the City Council. As demonstrated *supra*, there is no such term as "public benefit" use in the Resolution approving the overall development nor in the specific environmental determination and development permit for the former YMCA building. The Resolution calls for a "community service" use of the property with the YMCA listed parenthetically, indicating that the mitigating circumstance was to provide a civic as opposed to commercial or residential use of the property.

Private clubs such as the YMCA and worship centers such as Calvary Chapel are both permitted civic uses under the applicable zoning classification. Therefore, Petitioners have not alleged material facts that show that the City was compelled to undertake a full developmental permit and environmental review process for the change of occupancy from the YMCA to Calvary Chapel. Therefore, Petitioners have not shown that they are entitled to mandamus or declaratory relief.

III. PETITIONERS CANNOT OBTAIN RELIEF THAT WOULD INVOLVE DIRECTING THE CITY TO VIOLATE RLUIPA.

Petitioners' request for relief is also fatally flawed because they are asking this Court to order that the City violate state and federal anti-discrimination laws that prohibit differential treatment on the basis of religion, including the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §2000cc ("RLUIPA"). The City approved approximately 170 tenant improvements for uses allowed in the underlying zone similar to the application made by Real Parties in Interest in this case in 2017, and approximately 220 similar applications for tenant improvements in 2016. (City Answer ¶42). **None of these applicants were required to obtain new Development Permits or modifications to existing Development Permits** when, as is true here: 1) the proposed new use was allowed in the zone; 2) the appropriate entitlement had already been issued for the underlying property; and 3) the proposed new use did not introduce any significant new impacts or changes to the existing conditions of approval for the underlying permit. (*Id.*). More specifically, the City approved approximately 27 tenant improvements for uses allowed in the underlying zone for the shopping center in which the former YMCA building is located, and **none were required to obtain a new Development Permit or modification of the existing Development Permit for their proposed uses**. (*Id.*). Consequently, Petitioners are demanding that the City impose different and more onerous standards and higher levels of discretionary review on Real Parties in Interest for their proposed religious use than the City requires for non-religious institutions. (City Answer ¶53).

That is precisely what the City is prohibited from doing under RLUIPA, and what this Court cannot require the City to do. The "equal terms" provision in RLUIPA prohibits any land use regulation "that treats a religious assembly or institution on less than equal terms with a nonreligious

assembly or institution[,]" or "that discriminates against any assembly or institution on the basis of religion or religious denomination[,]" or that "totally excludes religious assemblies from … or … unreasonably limits religious assemblies, institutions, or structures within a jurisdiction." 42 U.S.C. §2000cc(b). The use approved in 2002 was for a non-commercial, non-residential facility in which people would assemble to conduct activities of common interest (YMCA). If the Subject Property is transferred to and used by a church, it would be a non-commercial, non-residential facility in which people assemble to conduct activities of common interest. The fact that those activities might involve worship, Bible study or similar "church uses" cannot under RLUIPA be a reason for differential treatment by the City. *See, e.g.*, *Centro Familiar Cristiano Buenas Nuevas v. City of Yuma*, 651 F.3d 1163 (9th Cir. 2011).

In *Centro Familiar*, the Ninth Circuit found that the city's ordinance violated RLUIPA's "equal terms" provision by treating the church on a less than equal basis than it did similarly situated secular counterparts with respect to accepted zoning criteria. *Id.* at 1173. The city claimed the restrictions were necessary because of a liquor license law, but its ordinance referenced "religious organizations" rather than "uses that would impair issuance of a liquor license" (many of which were permitted as of right despite their practical effect of blocking bars and nightclubs), and it was not limited in scope to churches. *Id.* at 1174-75. Because the city required religious assemblies to obtain a conditional use permit and did not require similarly situated secular membership assemblies to do the same, it violated RLUIPA's equal terms provision. *Id.* That would be case here if the Court were to grant Petitioners' request for relief.

Petitioners' request that the Court order the City to require CEQA review and other development requirements that routinely are not required of similarly situated non-religious applicants amounts to a request that the Court direct the City to violate federal law. Because that is something this Court cannot do, and because this fatal flaw cannot be corrected by yet another amendment to the Petition, the Foundation's demurrer should be sustained without leave to amend.

CONCLUSION

Despite having three chances to do so, Petitioners have still not alleged material facts to establish a right to mandamus or declaratory relief for failure to comply with CEQA or failure to

comply with the City's Municipal Code. Petitioners' misleading paraphrase of the operative city approvals and of the relevant zoning designation for the Subject Property lack factual support and cannot be the basis for mandamus or declaratory relief. Also, Petitioners' use of manufactured terms to create the appearance of substantial change of use because of the religious nature of Calvary Chapel's use of the building seeks to create differential treatment based on religion in violation of RLUIPA.

For these reasons, this Court should sustain the demurrer without leave to amend.

Dated: November 5, 2018.

/s/ Horatio G. Mihet
Mary E. McAlister SBN 148570
Mathew D. Staver*
Horatio G. Mihet*
Liberty Counsel
Attorneys for Real Parties in Interest Dan H. Wilks And Staci Wilks, Trustees Of The Heavenly Father's Foundation Trust
* Admitted pro hac vice

PROOF OF SERVICE

Pursuant to Cal. Code Civ. P. 1013(a) and Cal. R. Ct. 9.4(c), I hereby certify that I served the foregoing via Federal Express, on November 5, 2018, and with courtesy copies via electronic mail, addressed as follows:

Robert L. Glushon
Sean M. Bryn
Kristina Kropp
LUNA & GLUSHON, A Professional Corporation
16255 Ventura Boulevard, Suite 950
Encino, California 91436
Telephone: (818) 907-8755
Facsimile: (818) 907-8760
Email: sbryn@lunaglushon.com
Attorneys for Petitioners

David Womack, Assistant City Attorney
City of Thousand Oaks
2100 Thousand Oaks Blvd.
Thousand Oaks, CA 91362
(805) 449-2170
dwomack@toaks.org
Attorney for Respondent

James Long
TYLER & BURSCH, LLP
Riverside County Office
25026 Las Brisas Road
Murrieta, California 92562
Telephone: (951) 600-2733 ext. 223
jlong@tylerbursch.com

Dated: November 5, 2018

/s/ Mary E. McAlister
Mary E. McAlister SBN 148570
Liberty Counsel
PO Box 11108
Lynchburg, VA 24506
Tel. (434) 592-7000
court@lc.org